EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (MERITS CRITERIA) (AMENDMENT) (No. 2) REGULATIONS 2013

2013 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2013 amend the merits criteria which the Director of Legal Aid Casework ("the Director") must apply when determining whether an applicant qualifies for civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). In cases where an application for full representation[1] is subject to an assessment of its prospects of success, it will no longer be eligible for legal aid where it is assessed as having only a 'borderline' prospect of success.

2.2 This instrument also makes amendments to the Civil Legal Aid (Merits Criteria) Regulations 2013 (S.I. 2013/104)[2] ("the Merits Criteria Regulations"), to ensure that a prospects of success test applies to cases falling within paragraph 15 of Part 1 of Schedule 1 to LASPO (children who are parties to family proceedings).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 This is one of a number of statutory instruments which implement legal aid reform proposals set out in the document: *Transforming Legal Aid: Next Steps*[3].

4.2 This instrument implements changes to the criteria which the Director must apply when determining whether an applicant qualifies for civil legal aid under Part 1 of LASPO, so that 'borderline' cases will no longer be eligible for civil legal aid.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

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[1] A form of civil legal service available through legal aid which covers all the work needed to support legal proceedings to trial and appeal

[2] http://www.legislation.gov.uk/uksi/2013/104/contents/made

[3] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State, Shailesh Vara, has made the following statement regarding Human Rights:

In my view the provisions of the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2013 are compatible with Convention Rights.

7. Policy background

7.1 Following on from the reforms set out in LASPO, the Government consulted on a package of reform proposals. The primary objective of the reform package is to bear down on the cost of legal aid, ensuring that every aspect of expenditure is justified and that we are getting the best deal for the taxpayer. Unless the legal aid scheme is targeted at the persons and cases where funding is most needed, it will not command public confidence or be credible.

7.2 *Transforming Legal Aid: Next Steps* sets out a number of reforms which the Government intends to make to legal aid provision under Part 1 of LASPO. One of the reforms set out in *Transforming Legal Aid: Next Steps* is removing civil legal aid for borderline cases.

7.3 As stated in *Transforming Legal Aid: Next Steps*, the Government continues to believe that it is a reasonable principle that, in order to warrant public funding through civil legal aid, a case should have at least a 50% prospects of success (i.e. moderate or greater). The Government's underlying view is that the merits test aims to replicate the decisions that somebody who pays privately would make when deciding whether to bring, defend or continue to pursue proceedings. Additionally, the Government does not think that a reasonable person of average means would choose to litigate in cases which only have a borderline prospects of success and does not think it is fair to expect taxpayers to fund such cases either.

7.4 This instrument implements the removal of civil legal aid for cases with borderline prospects of success.

7.5 In order to be granted civil legal aid, an applicant's case must satisfy the merits criteria as set out in the Merits Criteria Regulations. The merits criteria are divided into two main sections: general merits criteria, and specific merits criteria, which disapply, modify or supplement the general criteria in specific categories of cases. For applications for full representation (a specific type of civil legal service), the Merits Criteria Regulations generally require that cost benefit criteria are met, as well as prospects of success criteria.

7.6 In relation to prospects of success, the Legal Aid Agency is required to assess the likelihood that an individual who has made an application for civil legal services

will obtain a successful outcome at a trial or other final hearing in the proceedings to which the application relates. Usually the Legal Aid Agency will first require the applicant's solicitor to give an assessment of the prospects of success, which is then endorsed or rejected by the Legal Aid Agency.

7.7 There are certain categories of case where the prospects of success test does not apply. These are certain family cases and certain mental health cases. These cases are not affected by this instrument.

7.8 Those applications that are subject to the prospects of success test must generally have at least a 50% chance of success to receive legal aid funding for full representation (i.e. must have a 'moderate' or better prospects of success). Under the (unamended) Merits Criteria Regulations, civil legal aid may be available where a case has a borderline prospects of success, where additional criteria are met.

7.9 This instrument amends the merits criteria so that in cases where an application for full representation is subject to an assessment of its prospects of success, an individual will no longer be eligible for civil legal aid where it is assessed as 'borderline'.

7.10 This instrument also makes amendments to the Merits Criteria Regulations in respect of cases falling within paragraph 15 of Part 1 of Schedule 1 to LASPO (children who are parties to family proceedings).

7.11 These cases were erroneously omitted from the provisions in the Merits Criteria Regulations that apply a prospects of success test to cases. As a result, the prospects of success test is not currently applied to paragraph 15 cases under Part 1 of LASPO. This amendment therefore reinstates the former position (as under the Funding Code and the Access to Justice Act 1999) by applying a prospects of success test to such cases.

7.12 Part 2 of the instrument sets out the transitional provisions that apply to the amendments made by regulation 2. The transitional provisions provide that those amendments will not apply to:

a) applications for civil legal services made before this instrument comes into force;

b) applications for civil legal services made on or after the date on which this instrument comes into force, but which relate to the same case in which services have already been provided to the applicant as a result of an application made before this instrument comes into force (where the further application is for a different form of service which falls within the same variety of work as the earlier form of service); and

c) applications for civil legal services made on or after the date on which this instrument comes into force, but which relate to a case in which Licensed Work has already been provided to the applicant as a result of an application made before this instrument comes into force (and the Director has decided that the certificate should cover both sets of proceedings).

7.13 Provision is also made to determine when different forms of application (e.g., for Controlled Work, Licensed Work, and emergency representation) will have been made before this instrument comes into force.

8. Consultation outcome

8.1 The consultation *'Transforming Legal Aid: Delivering a more credible and efficient system'*[4] was published on 9 April 2013 and closed on 4 June 2013. Around 16,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public. The Ministry of Justice held 14 stakeholder events throughout the consultation period.

8.2 The majority of responses did not support the Government's original proposals for reform, although there was some support for particular measures. Some of the original proposals were modified in light of the comments received from consultees to ensure their implementation is fully consistent with Government's wider objectives, for example:

- the proposals on prison law have been amended to ensure criminal legal aid remains available for all proceedings before the Parole Board in which it has the power to direct release, as opposed to all cases that engage Article 5.4 of the European Convention on Human Rights. Sentence calculation cases where the date of release is disputed will also be retained.

- the residence test was revised to include exceptions for certain cases which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children.

- changes to expert fees will proceed, subject to retaining the rates payable to experts in those areas where recent increases have been made to address market supply issues. Fees payable to interpreters in London will be retained and the reduction in rates payable to interpreters outside London will be limited to ensure these do not fall below rates paid by CPS.

8.3 A detailed Government response to the consultation exercise is available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/user_uploads/annex-b-response-to-consultation.pdf.

[4] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

8.4 We have not consulted on the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2013.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. A programme of training and guidance for legal aid practitioners is being prepared by the Legal Aid Agency to support the transition to the new arrangements. There is no need for public guidance on these changes as they apply only to assessments and tests carried out by legal aid practitioners in completing an application for legal aid.

10. Impact

10.1 The impacts of the Government's programme of legal aid reforms are set out in a series of Impact Assessments, which were updated following publication of *Transforming Legal Aid: Next Steps*. These impact assessments are available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view An Impact Assessment has not been prepared specifically for this instrument.

10.2 In summary, we have estimated that around 100 borderline cases are expected to be affected a year, which will contribute to around £1m per annum saving to the legal aid fund. Civil legal aid providers are likely to experience a fall in demand for their services.

10.3 There is no impact on business, charities or voluntary bodies other than where it affects a contractual relationship between the Legal Aid Agency and providers of legal aid services, which has been assessed as part of the above Impact Assessments.

10.4 There is no impact on the public sector arising from this instrument beyond those accounted for in the Impact Assessments.

11. Regulation of small businesses

11.1 The legislation applies to small business only insofar as it affects the contractual relationship between the Legal Aid Agency and providers of legal aid services or the payment arrangements for barristers.

11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirement on firms employing up to 20 people.

11.3 The instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring & review

12.1 The operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency. The Ministry of Justice will conduct a post-implementation review of LASPO between three to five years after implementation. This review will also consider the operation of the secondary legislation, including this SI.

13. Contact

13.1 David Stokes at the Ministry of Justice (Tel: 020 3334 4281 or email david.stokes@justice.gsi.gov.uk) can answer any queries regarding the instrument.